Filed 2/14/11 P. v. Duran CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. RAUL JOSE DURAN, Defendant and Appellant.	C065293 (Super. Ct. Nos. CRF09-4665, CRF10-1527)

The trial court sentenced defendant Raul Jose Duran to five years eight months in state prison based on defendant's no contest pleas to receiving stolen property, possession of a controlled substance and admission of a strike prior and prior prison term. Defendant's ensuing appeal is subject to the principles of *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and *People v. Kelly* (2006) 40 Cal.4th 106, 110. In accordance with the latter, we will provide a summary of the offenses and the proceedings in the trial court.

In case No. CRF09-4665 (hereafter 4665), on or about September 6, 2009, a Woodland police officer found defendant to be in possession of 0.7 grams of methamphetamine. On

January 19, 2010, defendant entered a plea of no contest to possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) in exchange for a stipulated sentence of the midterm of two years and the dismissal of the remaining count and allegations. Sentencing was scheduled for April 16, 2010.

In case No. CRF10-1527 (hereafter 1527), on March 21, 2010, a Woodland police officer saw defendant carrying property taken from a car which had just been burglarized. Defendant entered a plea of no contest to receiving stolen property (Pen. Code, § 496, subd. (a))[1] and admitted a strike prior (§ 245, subd. (a)(1)—2004 assault with a deadly weapon) and a prior prison term allegation in exchange for dismissal of a second degree burglary charge with a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754, dismissal of the remaining counts and allegation, and a stipulated sentence of five years in case No. 1527 and a consecutive eight-month term in case No. 4665. Two other misdemeanor cases (case Nos. 10-800 and 10-837) were dismissed in light of the plea.

The court sentenced defendant accordingly, that is, in case No. 1527, the midterm of two years for the receiving offense, doubled for the strike prior, plus one year for the prior prison term, and in case No. 4665, a consecutive one-third the midterm or eight months for the possession offense.

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[1] Undesignated statutory references are to the Penal Code.

Defendant appeals. The court granted defendant's request for a certificate of probable cause. (§ 1237.5.)

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*Wende*, *supra*, 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief. More than 30 days have elapsed, and we have received no communication from defendant.

In a footnote, appellate defense counsel states that the trial court failed to break down a $190 laboratory fee and a $570 drug program fee (Health & Saf. Code, §§ 11372.5, 11372.7) into the amounts reflecting the fees and the amounts reflecting the penalty assessments and explains that she sent a letter to the trial court requesting amendment of the abstract of judgment to reflect the breakdown pursuant to *People v. High* (2004) 119 Cal.App.4th 1192, 1200. On February 8, 2011, this court received an amended abstract of judgment filed February 3, 2011, reflecting the breakdown.

While the laboratory fee and the drug program fee and assessments appear on the amended abstract, we note that the trial court never orally ordered defendant to pay either fee. The oral pronouncement of judgment by the court is the judgment. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) The abstract of judgment summarizes and must accurately reflect the oral

pronouncement of judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; *Mesa*, *supra*, 14 Cal.3d at p. 471; *People v. Zackery* (2007) 147 Cal.App.4th 380, 389.) The clerk of the court may not add to the judgment pronounced. (*Zackery*, at p. 389.)

While the laboratory fee is mandatory, the drug program fee is not. A judgment that fails to include the laboratory fee is an unauthorized sentence which may be corrected on appeal. The same cannot be said for the drug program fee which is mandatory provided that the trial court finds an ability to pay. A judgment that fails to include a drug program fee is not an unauthorized sentence. Instead, we presume that the trial court determined that defendant did not have the ability to pay the drug program fee. (*People v. Martinez* (1998) 65 Cal.App.4th 1511, 1516-1519.) We will order the judgment modified to provide for the mandatory laboratory fee and applicable penalty assessments and order the trial court to prepare an amended abstract accordingly. The amended abstract reflects the breakdown of this fee and applicable assessments. The amended abstract must be corrected to delete the $570 drug program fee and assessments.

The trial court also awarded defendant too many conduct credits. In case No. 1527, the court awarded 26 actual days and 26 conduct days. The recent amendments to sections 2933 and 4019 do not operate to increase the rate at which defendant earns presentence custody credit, as he has a prior conviction

for assault with a deadly weapon, a serious felony. (§§ 1192.7, subd. (c)(31), 4019, former subds. (b)(2) & (c)(2) [as amended by Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50], 2933, subd. (e)(3) [as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010].) Defendant is entitled to 12 days of conduct credit, not 26 days. The amended abstract of judgment filed February 3, 2011, fails to reflect any credit; instead, a box is checked next to the statement, "Probation to prepare and submit post-sentence report to CDCR per PC 1203c." It was the trial court's duty to determine the credits which "shall be contained in the abstract of judgment . . . ." (§ 2900.5, subd. (d).) We will direct the trial court to comply with the statute.

Having undertaken an examination of the entire record, we find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is modified to provide for a $50 laboratory fee (Health & Saf. Code, § 11372.5, subd. (a)) and applicable penalty assessments. The judgment is further modified to provide for 12 conduct days for a total of 38 days of presentence custody credit in case No. CRF10-1527. The trial court is directed to prepare a second amended abstract of judgment accordingly that also deletes the $570 drug program fee and assessments and to forward a certified copy to the Department of Corrections and Rehabilitation. The amended abstract filed February 3, 2011, correctly reflects the

breakdown of the lab fee and assessments. As modified, the judgment is affirmed.

BUTZ, J.

We concur:

RAYE, P. J.

MURRAY, J.